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Gary Dubin

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NOTES

The Uninsured Motorist: A Look At The Various Uninsured Motorist Statutes

So long as states continue to determine liability for automobile accidents on the basis of the traditional concept of negligence, the financial resources of the tort-feasor are all important. Justice is served when innocent victims of automobile accidents can recover for any losses sustained through another's negligent operation of a motor vehicle. This note will show what has been accomplished with respect to this problem and what further steps can be taken in the area of the uninsured motorist. In addition, the various statutory plans and the major problems which have arisen under these relatively new statutory plans will be reviewed. The problems dealt with include: (1) notice provisions; (2) rights and duties of insurers to defend suits against uninsured motorists; (3) arbitration provisions; (4) residency problems; (5) disclaimer of other insurers; and (6) statutory construction and interpretation.

TYPES OF STATUTES

There have been many attempts by various states to afford protection against the uninsured motorist. Massachusetts, as a prerequisite to registration, requires proof of a liability insurance policy for each registered auto.¹ Upon registration, the registrant must produce either (1) the certificate of an insurance company which shows that the registrant has a motor vehicle liability policy,² (2) a "motor vehicle liability bond" which conditions that the obligor shall satisfy all judgments rendered against him arising out of the use or operation of his motor vehicle,³ or (3) a deposit of cash, stock, or bonds in the amount of \$5,000 as security for the payment by the registrant of all judgments rendered against him for injury caused by operation of his motor vehicle.⁴ Failure to abide by these requirements will subject the operator of a motor vehicle to fine or imprisonment.⁵

Some states such as Ohio have Financial and Safety Responsibility Laws.⁶ The Ohio Revised Code defines proof of financial responsibility as

1. MASS. ANN. LAWS ch. 90, §§ 34A, D, H, J (Supp. 1962); ch. 90, §§ 34B, C, E, F, G, I (1954); ch. 175, §§ 113A, B, D (Supp. 1962); ch. 175, §§ 113C, E, F, G (1959).

2. MASS. ANN. LAWS ch. 90, § 34A (Supp. 1962).

3. *Ibid.*

4. MASS. ANN. LAWS ch. 90, § 34D (Supp. 1962).

5. MASS. ANN. LAWS ch. 90, § 34J (Supp. 1962).

6. OHIO REV. CODE §§ 4509.01-99.

proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle⁷

After an individual has been involved in a motor vehicle accident in Ohio in which judgment has been rendered against him, he thereafter must establish proof of financial responsibility as a prerequisite to continued licensing.⁸ These older statutes, however, fail to provide complete protection against the uninsured motorist, and as a result new statutes have been enacted to protect the innocent against the hazards of the financially irresponsible, uninsured motorist. The three basic plans which attempt to solve the problem are: (1) the "Unsatisfied Claim and Judgment Fund;" (2) the "Compulsory Uninsured Motorist Endorsement Plan;" and (3) the "Combined Plan." States having an Unsatisfied Claim and Judgment Fund are New Jersey,⁹ Maryland,¹⁰ and North Dakota.¹¹ States having Compulsory Uninsured Motorist Endorsement Plans are New Hampshire,¹² Florida,^{12a} Virginia,¹³ South Carolina,¹⁴ and California.¹⁵ New York has the Combined Plan.¹⁶

Unsatisfied Claim and Judgment Fund

To protect persons who have judgments against uninsured motorists or who sustain losses caused by unknown motorists, some states have enacted statutes creating a fund out of which such uncollectible judgments can be satisfied.¹⁷ The fund is supported by imposts upon uninsured motor vehicle owners and insurance companies.¹⁸ New Jersey assesses a special registration fee of one dollar which is earmarked for the fund.¹⁹ If the automobile is uninsured, the fee is three dollars.²⁰ Any deficiency in the fund is made up from assessments against insurers doing business in New Jersey on a pro rata basis equal to the percentage their premium in-

7. OHIO REV. CODE § 4509.01 (K).

8. Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960) [hereinafter cited as Ward, *The Uninsured Motorist*, 9 BUFFALO L. REV. 283 (1960)].

9. N.J. STAT. ANN. §§ 39:6-61 to -104 (1961).

10. MD. ANN. CODE art. 66½, §§ 150-79 (1957).

11. N.D. CENT. CODE §§ 39-17-01 to -10 (1960).

12. N.H. REV. STAT. ANN. §§ 268:15, 412:2-A (Supp. 1961).

12a. FLA. STAT. § 627.0851 (1961).

13. VA. CODE ANN. § 38.1-381 (Supp. 1962).

14. S.C. CODE § 46-750.14 (1962).

15. CAL. INS. CODE § 11580.2.

16. N.Y. INS. LAW §§ 600-25, 167(2) (a).

17. 7 AM. JUR. 2D *Automobiles and Highway Traffic* § 301 (1963).

18. Robson v. Rodriguez, 26 N.J. 517, 141 A.2d 1 (1958).

19. N.J. STAT. ANN. § 39:6-63 (b) (1961).

20. N.J. STAT. ANN. § 39:6-63 (a) (1961).

come from such business bears to the total of such business within the state.²¹

Those qualified to collect from the fund in New Jersey include: (1) residents of New Jersey; (2) owners of motor vehicles registered in New Jersey; and (3) residents of other states, territories, or districts of the United States where recourse is afforded to residents of New Jersey "of substantially similar character" as that provided in New Jersey.²² The last clause, dealing with reciprocity, has caused much confusion and will be discussed subsequently.²³ A claimant from the fund must show that he has made every effort to satisfy his judgment, including attachment of any property or other assets of the judgment debtor.²⁴ The fund is not intended to make every claimant completely whole, but is to provide only some measure of relief, up to a maximum of \$5000.²⁵ Where a claimant has received compensation for his injuries from other sources, such compensation is deducted from the amount recoverable from the fund.²⁶

The principal arguments against the fund approach are: (a) the state is selling insurance in competition with private insurers; (b) the burden of the cost is placed on those already insured through increased premiums; and (c) the irresponsible motorists are purchasing cheap insurance protection. However, in weighing these arguments against the fact that many victims who heretofore had gone uncompensated are now being compensated for their injuries, the objections cannot prevail.²⁷ Since the uninsured motorists cannot collect from the fund, they are not actually purchasing insurance cheaply. While it is true that in essence the uninsured motorist is obtaining inexpensive liability protection, the real purpose of the fund is to protect the innocent victim.

Compulsory Uninsured Motorist Endorsement Plan

Under the "Compulsory Uninsured Motorist Endorsement Plan," every insurer writing automobile liability insurance in a particular state must include within its coverage an uninsured motorist endorsement.²⁸ The purpose of a statute making uninsured motorist coverage compulsory is to give the same protection to a person injured by an uninsured motorist as he would have had if he had been injured by an automobile covered

21. N.J. STAT. ANN. § 39:6-63 (c) (1961).

22. N.J. STAT. ANN. § 39:6-62 (1961).

23. See pp. 390-91 *infra*.

24. N.J. STAT. ANN. § 39:6-70 (1961).

25. *Wormack v. Howard*, 33 N.J. 139, 162 A.2d 846 (1960); *Dixon v. Gassert*, 26 N.J. 1, 138 A.2d 14 (1958).

26. *Dixon v. Gassert*, *supra* note 25.

27. 24 Ga. B.J. 426, 431 (1962).

28. Note, 47 VA. L. REV. 145 (1961).

by a standard liability policy.²⁹ New Hampshire,³⁰ Florida,^{30a} Virginia,³¹ South Carolina,³² and California³³ have adopted this type of provision. Only Virginia and South Carolina, however, extend coverage to property damage as well as personal injuries.

The Virginia statute presents a prime example of this type of plan. The Virginia General Assembly has placed the financial burden of protecting victims of uninsured drivers upon the owners of uninsured motor vehicles by requiring the uninsured motorist to pay an additional registration fee. The money is in turn distributed to each insurance company writing uninsured motorist endorsements in Virginia in the proportion which its premium income for the previous year from the basic uninsured motorist coverage bears to the total of such premium income from all such basic coverage written in the state during the previous year.³⁴ This distribution to the insurers reduces the insured's premium cost.³⁵ Even if a policy is issued without a provision for an uninsured motorist endorsement, the insured still will be afforded uninsured motorist coverage.³⁶ These policies must cover the "named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either. . . ."³⁷ The policy contains a second mandatory classification which provides coverage for any other person who uses the insured's vehicle with the express or implied consent of the named insured and for any guest in such vehicle.³⁸

New York's Combined Plan

New York has combined the features of the "Fund Plan" and the "Uninsured Motorist Endorsement Plan."³⁹ Those who have automobile liability insurance receive the mandatory uninsured motorist endorsement. Those who do not have such coverage may proceed against a fund which protects persons who are injured by uninsured motorists and cannot collect their judgment. To administer the fund, New York has created the Motor Vehicle Accident Indemnification Corporation (hereinafter re-

29. 7 AM. JUR. 2D *Automobile Insurance* § 135 (1963).

30. N.H. REV. STAT. ANN. §§ 268:15, 412:2-A (Supp. 1961).

30a. FLA. STAT. § 627.0851 (1961).

31. VA. CODE ANN. § 38.1-381 (Supp. 1962).

32. S.C. CODE § 46-750.11 (1962).

33. CAL. INS. CODE § 11580.2.

34. Note, 47 VA. L. REV. 145 (1961).

35. *Ibid.*

36. Chadwick & Poche, *California's Uninsured Motorist Statute: Scope and Problems*, 13 HASTINGS L.J. 194 (1961).

37. VA. CODE ANN. § 38.1-381(c) (Supp. 1962).

38. *Ibid.*

39. N.Y. INS. LAW §§ 600-25, 167(2) (a).

ferred to as MVAIC), a non-profit corporation.⁴⁰ Capital is provided by a charge on those insurers writing automobile liability policies in the state, all of whom must belong to the corporation. The carriers are entitled to have the amount of this charge considered as a rating factor in the determination of their premium rates; the larger the assessment, the larger will be their premium charges.⁴¹

In enacting the combined plan, the New York Legislature felt that a compulsory insurance statute

fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them, in that the act makes no provision for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by (1) uninsured motor vehicles registered in a state other than New York, (2) unidentified motor vehicles which leave the scene of the accident, (3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, (4) stolen motor vehicles, (5) motor vehicles operated without the permission of the owner, (6) insured motor vehicles where the insurer disclaims liability or denies coverage and (7) unregistered motor vehicles. The legislature determines that it is a matter of grave concern that such innocent victims are not recompensed for the injury and financial loss inflicted upon them and that the public interest can best be served by closing such gaps⁴²

The present statute, in seeking to extend coverage to a maximum number of persons, provides for two classes of claimants: the "qualified" person and the "insured."⁴³ The basic distinction between the two is that "qualified" persons do not own motor vehicle insurance of any kind, while "insured" persons own either a policy of their own or qualify under another's "omnibus clause."⁴⁴ Different procedures are applicable to "qualified" persons as opposed to "insured" persons, *e.g.*, an insured is required to arbitrate his claim, while a qualified person can resort directly to the courts.⁴⁵ In most cases, the claimant's cause of action, whether an insured person or a qualified person, is about the same. Classification, however, may affect the claimant's ultimate recovery.⁴⁶ For example,

40. Ward, *The Uninsured Motorist*, 9 BUFFALO L. REV. 283 (1960).

41. *Ibid.* In effect, those who have coverage under the uninsured motorist endorsement provision are bearing the cost of the plan through increased payments. The higher the charge against the insurer by MVAIC, the higher will be the insurer's premium charges which will be borne by those who are insured. There should be assessments against uninsured vehicle owners as well.

42. N.Y. INS. LAW § 600(2).

43. Duesenberg, *Recent Developments in Insurance Law*, 1963 INS. L.J. 213, 220.

44. An "omnibus" clause is a provision which includes in the term "insured" not only the named insured, but any other person using the motor vehicle with the consent, express or implied of the named insured. See VA. CODE ANN. § 38.1-381(a) (Supp. 1962).

45. See McCullough, *The Uninsured Motorist*, 33 N.Y.S.B.J. 343 (1961).

46. See, *e.g.*, *Balletti v. Motor Vehicle Acc. Indem. Corp.*, 228 N.Y.S.2d 768 (App. Div.

while there is no requirement that a claimant under the endorsement be a resident of New York, a qualified person must be a resident of New York or a resident of a state which provides recourse of "substantially similar character" to that of New York.⁴⁷ If a resident of Ohio had an accident in New York while riding in an automobile insured in New York, he could recover under the endorsement. He could not recover if he was a passenger in an automobile with a minimum liability policy since Ohio has no similar statutory provision. This circumstance seems to put those who commute or travel to New York at a distinct disadvantage, and it is a matter which needs re-examining. No valid reason seems to exist for punishing those travelers to New York whose home states do not have similar legislation.

The remainder of this article will focus on the case law which has developed under the various statutes. In presenting this case analysis, the applicable sections of the statutes will necessarily be covered.

NOTICE PROVISIONS

The courts in interpreting the notice provisions have been faced with the following questions: When must notice be given to the fund director? When must notice be given to the insurer? When is notice excused? When is a delay allowed? What is the effect of failure to give notice? The problems associated with notice have provided one of the main sources of uninsured motorist litigation.

New Jersey — The Unsatisfied Claim and Judgment Fund

The New Jersey statute presents a typical notice provision.⁴⁸ The Unsatisfied Claim and Judgment Fund Act contains a mandatory provision making notice to the fund director within a stated time after the accident a prerequisite to recovery.⁴⁹ The date of mailing usually prevails as to whether notice was given within the stated period,⁵⁰ and if the notice

1962); *Zuckerman v. Motor Vehicle Acc. Indem. Corp.*, 212 N.Y.S.2d 179 (App. Div. 1961); *Application of Culver*, 225 N.Y.S.2d 666 (Sup. Ct. 1962).

47. N.Y. INS. LAW § 601. This is the same provision which can be found in the states having Unsatisfied Claim and Judgment Funds. See note 21 *supra*.

48. N.J. STAT. ANN. § 39:6-65 (1961) provides that "any qualified person . . . who suffers damages resulting from bodily injury or death . . . arising out of the . . . use of a motor vehicle in this State . . . and whose damages may be satisfied in whole or in part from the fund, shall, within 90 days after the accident . . . give notice to the board . . . of his intention to make a claim thereon . . . provided, any such qualified person may, in lieu of giving said notice within said time, make proof to the court . . . (a) that he was physically incapable of giving said notice within said period and that he gave said notice within 90 days after he became physically capable to do so or in the event he did not become so capable, that a notice was given on his behalf within a reasonable period, or (b) that he gave notice to the board within 15 days of receiving notice that an insurer had disclaimed on a policy of insurance . . ."

49. *Szczesny v. Vasquez*, 71 N.J. Super. 347, 177 A.2d 47 (App. Div. 1962).

50. *Gervolino v. Porter*, 75 N.J. Super. 246, 183 A.2d 98 (App. Div. 1962).

is not received, the burden of proving the date of mailing is on the claimant.⁵¹

There are two exceptions to the normal provisions for giving notice to the fund director: when the claimant is "physically incapable" of giving notice within the prescribed time and when a claimant is allowed to give notice "within a reasonable period." These terms have been difficult to interpret.⁵²

The leading case in the fund states is *Giacobbe v. Gassert*,⁵³ where the claimant suffered severe physical and mental illness and thus failed to give timely notice. The fund director contended that the claimant could have written a letter of notice to the board or could have directed someone to give notice for him. The court rejected a strict literal interpretation of the phrase "physically incapable," stating:

[N]otice is a process to prevent overreaching and otherwise to secure efficient administration of the fund; and the provision should be liberally read and applied to serve and not to subvert the substantive policy of relief in the given circumstances. . . .⁵⁴

The court further stated that "his incapacity in all likelihood was a factor contributing to his continued ignorance of the law and the fund created for relief in such cases."⁵⁵

Physical incapacity has been established where

because of the physical injuries and their treatment and preoccupation with his affliction and fear of evil consequences, the victim of the mishap was not mentally and emotionally adjusted to his responsibility of giving notice. . . .⁵⁶

It has been held, however, that if the victim of the accident is capable of understanding the nature and effect of other business transactions, he is capable of giving timely notice to the fund.⁵⁷ Furthermore, neither emotional concern for the welfare of a spouse⁵⁸ nor infancy⁵⁹ will constitute "physical incapability" within the meaning of the notice provision.

Virginia — Compulsory Uninsured Motorist Endorsement Plan

There is little case law in the field of the uninsured motorist endorsement plan. Where such coverage exists, some states enforce arbitration clauses in the insurance contract. This practice prevents disputes from

51. *Szczesny v. Vazquez*, 71 N.J. Super. 347, 177 A.2d 47 (App. Div. 1962).

52. See statutory provisions set forth in note 48 *supra*.

53. 29 N.J. 421, 149 A.2d 214 (1959).

54. *Id.* at 426, 149 A.2d at 217.

55. *Id.* at 426, 149 A.2d at 216.

56. *Id.* at 425, 149 A.2d at 216.

57. *Russo v. Forrest*, 52 N.J. Super. 233, 145 A.2d 339 (App. Div. 1958).

58. *Gervolino v. Porter*, 75 N.J. Super. 246, 183 A.2d 98 (App. Div. 1962).

59. *Trevorrow v. Boyer*, 52 N.J. Super. 215, 145 A.2d 154 (L. 1958).

reaching the courts. In other states, such as Virginia, insurers settle the vast majority of uninsured motorist claims without going to court.⁶⁰ Virginia prohibits arbitration of these claims.⁶¹

In Virginia, the insured may sue an unknown owner or operator by naming the defendant as "John Doe." Service of process is then perfected by delivery of the pleadings to the clerk of the court in which the action is brought and service on the insurer as though such insurer were a party defendant.⁶² If the uninsured motorist is known, there is no requirement that notice be given to the Commissioner of Motor Vehicles as a condition precedent to recovery. Nevertheless, service of process must be made upon the insurer as a prerequisite to recovery from such insurer.⁶³

There has been little case law regarding notice with respect to uninsured motorist endorsement statutes because the problem of reporting to the fund director does not arise. The only notice that need be given is to the insurance company which issued the policy. The problem of giving notice to the insurer to enable it to defend the tort-feasor will be dealt with in a subsequent section of the article.

New York — The Combined Plan

New York has a notice provision similar to that of New Jersey.⁶⁴ New York courts have held that "within a reasonable time" means notice that is reasonably possible under all of the circumstances of the particular case.⁶⁵ Although this definition appears to be more liberal, the burden of proving that a delay in giving notice was reasonable is upon the insured.⁶⁶ Difficulty in determining the existence of insurance coverage is an insufficient basis for delay in filing an application for recovery.⁶⁷ Where, however, the claimant was informed that the tort-feasor had insurance, and subsequent to the time notice had to be given the claimant discovered the information was erroneous, it was held that notice was given within a reasonable time when he filed soon afterwards.⁶⁸ Where arbitration is required, the issue of timely notice is not arbitrable; rather it is a factual issue which must be determined by the court.⁶⁹

60. Note, 47 VA. L. REV. 145, 151 (1961).

61. VA. CODE ANN. § 38.1-381(g) (Supp. 1962).

62. VA. CODE ANN. § 38.1-381(e) (Supp. 1962).

63. VA. CODE ANN. § 38.1-381(e) (1) (Supp. 1962).

64. N.Y. INS. LAW § 608. Notice is required within 90 days of the accident or "within a reasonable time" if there is incapacity or another valid reason for delay.

65. See Application of Motor Vehicle Acc. Indem. Corp., 235 N.Y.S.2d 34 (Sup. Ct. 1962); Kaiser v. Motor Vehicle Acc. Indem. Corp., 231 N.Y.S.2d 178 (Sup. Ct. 1962).

66. Kaiser v. Motor Vehicle Acc. Indem. Corp., *supra* note 65.

67. Application of Culver, 225 N.Y.S.2d 666 (Sup. Ct. 1962).

68. Motor Vehicle Acc. Indem. Corp. v. Soister, 227 N.Y.S.2d 979 (Sup. Ct. 1962).

69. Motor Vehicle Acc. Indem. Corp. v. Brown, 223 N.Y.S.2d 309 (App. Div. 1961).

It can readily be seen that there is much confusion in the various jurisdictions as to when notice must be given or may be excused, what constitutes "physical incapability," and what is a "reasonable time." Perhaps the statute should enumerate more clearly the elements which qualify one for excusable delay in giving notice. It is a heavy burden on the courts to require the judiciary to interpret these general qualifications. For the sake of uniformity, the legislatures should attempt to eliminate the vagueness which exists in the notice provisions of the various uninsured motorist statutes.

RIGHTS AND DUTIES OF INSURER TO DEFEND SUITS AGAINST UNINSURED MOTORISTS

Fund States

In New Jersey, investigations of claims against the fund are assigned to insurers; when notice of an action against an uninsured motorist is received, the Board may assign insurers to defend such an action.⁷⁰ The insurer which has been assigned may, through counsel, enter an appearance "on behalf of, and in the name of, the defendant."⁷¹ The defendant also has the right to employ his own counsel and defend the action.⁷²

The right of the Unsatisfied Claim and Judgment Fund Board to assign the defense of actions against uninsured motorists to insurers was upheld in Maryland,⁷³ which has a statute similar to that of New Jersey.⁷⁴ In *Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*,⁷⁵ the insurers contended that the requirement that they investigate and defend claims upon the fund imposed an unconstitutional burden upon them. In rejecting the insurer's contentions, the Maryland Court of Appeals stated:

The state could take over the business of automobile liability insurance completely and exclude private participation, or it could compel private insurers in that field to insure all motorists assigned to them. . . . Since the State lawfully could impose those burdens or exactions on automobile liability insurers, it properly can make the lighter demands on them that the Act calls for, as a condition of doing in Maryland the business in which they are engaged for profit.⁷⁶

Closely aligned with this problem is the problem of default judgments. New Jersey prohibits payments out of the fund for default judgments.

70. N.J. STAT. ANN. § 39:6-66(a), (b) (1961).

71. N.J. STAT. ANN. § 39:6-67 (1961).

72. *Ibid.*

73. *Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 150 A.2d 421 (1959).

74. MD. CODE ANN. art. 66½, §§ 150-79 (1957).

75. 219 Md. 607, 150 A.2d 421 (1959).

76. *Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 621, 150 A.2d 421, 430 (1959).

ments unless notice is given to the Board prior to the entry of such judgment, allowing the Board an opportunity to take action.⁷⁷ The policy of those who administer the fund is to require that the defendant's liability be established, and the entry of a default judgment will cause the courts to look closely to determine the true damages sustained.⁷⁸

Endorsement Plan

The Virginia statute provides that

any insured intending to rely on the coverage required by paragraph (b) of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law as though such insurance company were a party defendant; such company . . . shall have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the insured motor vehicle or in its own name⁷⁹

There is a problem as to who should control the defense. Both the insurer and the uninsured motorist have substantial interests at stake. The insurer will have to pay any judgment rendered for the insured. The uninsured motorist will be bound by any judgment against him and will be liable to the insurer as subrogee of the insured's claim.⁸⁰ The insured must obtain service of process on the insurer and, unless waived by the insurance company the insurer will be bound when he has such service and refuses to enter the case.⁸¹

In *Matthews v. Allstate Ins. Co.*,⁸² the insurer was invited to defend the action but did not do so and did not make the reasons for his inaction known to the insured. The insurer claimed that it could not enter unless authorized to do so by the uninsured defendant and consequently should be absolved of any liability on the policy. The court, however, held that the liability of the insurer is not dependent upon the fact that the uninsured motorist has approached the insurer and requested that the insurer defend him.⁸³ In upholding the right of an insurance company to intervene in such a suit, the court said:

77. N.J. STAT. ANN. § 39:6-74 (1961).

78. See *Douglas v. Harris*, 35 N.J. 270, 173 A.2d 1 (1961); *Myers v. Cave*, 55 N.J. Super. 185, 150 A.2d 269 (App. Div. 1959).

79. VA. CODE ANN. § 38.1-381(e) (1) (Supp. 1962).

80. Note, 47 VA. L. REV. 145, 167 (1961). "It would seem that the insurer must work closely with the attorneys for the uninsured motorist. In reality the insurer is no more than an intervenor in the suit, even though it possesses a statutory right to appear. It cannot be deprived, by the uninsured, of the right to defend in the name of the uninsured." *Ibid.*

81. *Matthews v. Allstate Ins. Co.*, 194 F. Supp. 459 (E.D. Va. 1961); *Creteau v. Phoenix Assur. Co.*, 202 Va. 641, 119 S.E.2d 336 (1961).

82. *Matthews v. Allstate Ins. Co.*, *supra* note 81.

83. *Id.* at 465.

It is inconceivable to this Court that an insurance company, desirous of affording protection required by the terms of the policy, would not be granted leave . . . to intervene as a party defendant⁸⁴

The insurance company cannot raise any issues of policy coverage in the tort action against the uninsured motorist because such a proceeding is an action *ex delicto* for the injury and not an action *ex contractu* on the policy.⁸⁵ However, if the insurer denies all liability on the policy, it cannot claim the benefits of the "right to defend" provisions.⁸⁶

The right of an insurer to intervene in a suit against an uninsured motorist has been upheld in states which do not make the "endorsement" mandatory by statute.⁸⁷ A Missouri court of appeals stated:

The insured [insurer?] should have the right to dispute the questions which make it liable on its contract. To say in this case that the action is premature because the insured has not yet established the legal liability of the uninsured motorist would in effect convert the "legally liable" policy to an unsatisfied judgment policy and would promote the multiplicity of suits.⁸⁸

The question of whether entry into the suit by the insurer amounts to a tacit admission of liability under the insurance contract has not yet been decided by the courts. Since the statutes authorize service of process on the insurers and some statutes authorize the assignment of the defense to the insurers, it is doubtful that their entry into the suit will be regarded as a tacit admission of liability. A contrary argument, however, can be reasoned on the basis that an insurance company may lose its right of defense if it disclaims liability under a policy; therefore, its entrance into the suit is a tacit admission of liability. It will be interesting to see how the courts resolve this problem. It may be advisable to clarify this point by statute.

The problem of service of process on an insurer doing business in a "compulsory endorsement" state may arise when the action is brought in a foreign state which does not permit an insurance company to be joined as a party defendant. Perhaps the only way to satisfy the requirement of service would be to have the insurance company named as a party defendant and let it come in and demur to the action.

84. *Id.* at 466.

85. *Rodgers v. Danko*, 204 Va. 140, 129 S.E.2d 828 (1963).

86. *Childs v. Allstate Ins. Co.*, 237 S.C. 455, 117 S.E.2d 867 (1961).

87. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Craig*, 364 S.W.2d 343 (Mo. Ct. App. 1963).

88. *Id.* at 347.

New York

New York has similar provisions whereby the MVAIC can enter a suit and defend an uninsured motorist.⁸⁹ The same principles involved in the cases cited in the previous sections on the insurer's defense in the fund states and on the insurer's defense in the "endorsement" states, apply to the provisions in the New York statute.⁹⁰ With respect to default judgments, the New York statute provides "that no claim shall be allowed and ordered to be paid by the corporation if the court shall find . . . that it is founded upon a judgment which was entered by default"⁹¹ The judgment will be set aside upon application by MVAIC and it can then proceed in the action.⁹² The same rules apply if the judgment was entered with the consent of the defendant.⁹³ The obvious reasoning behind these provisions protecting against default judgments is that neither the insurers nor the fund should be liable unless a full opportunity to defend is afforded them.

ARBITRATION

The Virginia⁹⁴ and South Carolina⁹⁵ statutes expressly prohibit arbitration provisions in an uninsured motorist policy. California, however, provides that if the insured and insurer do not agree on liability or damages, the dispute is arbitrable.⁹⁶ Questions concerning the interpretation or applicability of the uninsured motorist endorsement itself do not fall within the compulsory arbitration clause.⁹⁷ Some courts hold that arbitration clauses are contrary to public policy and unenforceable because they conflict with the basic right of every individual to have his rights determined in court.⁹⁸

Most arbitration cases have arisen in New York, which permits arbitration of disputes between an insured and the insurer (MVAIC). Arbitrable issues generally have been limited to whether the insured was

89. See N.Y. INS. LAW § 609.

90. See McCullough, *The Uninsured Motorist*, 33 N.Y.S.B.J. 343 (1961).

91. N.Y. INS. LAW § 614.

92. *Ibid.*

93. *Ibid.*

94. VA. CODE ANN. § 38.1-381(g) (Supp. 1962). "No such endorsement or provisions shall contain any provision requiring arbitration of any claim . . . nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings." *Ibid.*

95. S.C. CODE ANN. § 46-750.18 (1962).

96. CAL. INS. CODE § 11580.2(e).

97. See Chadwick & Poche, *California's Uninsured Motorist Statute: Scope and Problems*, 13 HASTINGS L.J. 194 (1961).

98. See *State ex rel. State Farm Mut. Auto Ins. Co. v. Craig*, 364 S.W.2d 343 (Mo. Ct. App. 1963); *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085 (Okla. 1960).

"legally entitled to recover" and the amount recoverable.⁹⁹ Some New York courts, however, have taken the opposite view and have held that all issues pertaining to the obligation of the insurer to pay are arbitrable.¹⁰⁰ In the case of a "qualified" person, there is no provision for arbitration, and he pursues his remedy immediately in the courts.¹⁰¹

There has been a great deal of confusion as to which issues are immediately arbitrable and which issues must first be tried in the courts. It generally is held that the issue of whether the other car was insured or uninsured is not an arbitrable issue.¹⁰² Whether proper notice was given to the corporation is not an arbitrable issue.¹⁰³ The issue of whether the alleged uninsured driver was covered as a member of the insured's household was held to be a question for the court to decide, not the arbitrators.¹⁰⁴ Whether there was actual physical contact between the insured's car and a hit-and-run driver was a question for the court to determine as a condition precedent to arbitration.¹⁰⁵ In an action based upon an insurer's alleged disclaimer of coverage, the disputed facts of the disclaimer must be determined by a court prior to the arbitration of any claim arising under the policy.¹⁰⁶ A minor child cannot be required to arbitrate in New York,¹⁰⁷ but an action by the father of a minor is subject to arbitration.¹⁰⁸ The narrowness of the arbitration provision is best illustrated by the court's opinion in *The Matter of McGuiness*.¹⁰⁹ The court stated:

It is manifest that the parties in the instant case have not "broadly" agreed to arbitrate a dispute "arising out of or in connection with" the Endorsement but have narrowly agreed to arbitrate two disputes and two alone, *i.e.*, whether the person making the claim is "legally entitled

99. See McCullough, *The Uninsured Motorist*, 33 N.Y.S.B.J. 343 (1961).

100. *Ibid.* Since MVAIC is responsible for payment to both insured and qualified persons, this distinction does not seem plausible. It appears that the qualified person has better procedural facilities at his disposal because his entire claim is adjudicated at once, whereas an insured may have to go to court to settle certain factual issues and then return to arbitration to settle his claim.

101. See, *e.g.*, *In the Matter of Rosenbaum*, 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962); *Motor Vehicle Acc. Indem. Corp. v. Tucker*, 226 N.Y.S.2d 165 (Sup. Ct. 1962); *Application of Travelers Indem. Co.*, 227 N.Y.S.2d 282 (Sup. Ct. 1962).

102. See, *e.g.*, *Application of Zurick Ins. Co.*, 219 N.Y.S.2d 748 (App. Div. 1961); *Motor Vehicle Acc. Indem. Corp. v. Velez*, 220 N.Y.S.2d 954 (App. Div. 1961).

103. See, *e.g.*, *Application of Motor Vehicle Acc. Indem. Corp.*, 228 N.Y.S.2d 508 (Sup. Ct. 1962); *Motor Vehicle Acc. Indem. Corp. v. Brown*, 223 N.Y.S.2d 309 (App. Div. 1961).

104. *Application of Phoenix Assur. Co.*, 194 N.Y.S.2d 770 (App. Div. 1959).

105. *Motor Vehicle Acc. Indem. Corp. v. Comerchero*, 227 N.Y.S.2d 285 (Sup. Ct. 1962).

106. See, *e.g.*, *Motor Vehicle Acc. Indem. Corp. v. Lucash*, 230 N.Y.S.2d 262 (App. Div. 1962); *Application of Motor Vehicle Acc. Indem. Corp.*, 227 N.Y.S.2d 886 (Sup. Ct. 1962).

107. *Benfante v. Commercial Ins. Co.*, 162 N.Y.S.2d 715 (Sup. Ct. 1957).

108. *Chernick v. Hartford Acc. & Indem. Co.*, 187 N.Y.S.2d 534 (App. Div. 1959). See 7 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4331 (Rev. ed. 1962); *Annot.*, 79 A.L.R. 2d 1252 (1961).

109. 225 N.Y.S.2d 361 (Sup. Ct. 1962).

to recover damages from the owner or operator of an uninsured automobile" and "the amount of payment which may be owing under this endorsement."¹¹⁰

Apparently, an unnecessary duplication of procedure is involved in arbitrating one's claim. Most of the issues arising under the policy must be decided judicially. After the court decides the issues, the insured motorist must return to the arbitration table. Perhaps it would be more plausible to eliminate arbitration, as did Virginia, and have the court determine the validity of the entire claim and the amount recoverable in a single hearing. Of course, if the insurer and insured can arrive at a fair settlement on their own, then this large multitude of litigation can be reduced.

RESIDENCY PROBLEMS UNDER THE FUND

To qualify under the fund, one must be a resident of the fund state or a resident of another state in which similar recourse is afforded.¹¹¹ A New Jersey court in *Collins v. Yancey*¹¹² held that a native of Virginia who worked in New Jersey for five months prior to being injured was a "qualified" person within the meaning of the statute. Conversely, where a claimant, a native of West Virginia, accepted a job in a fund state but was injured before he started working, he was held not a "qualified" resident under the statute.¹¹³ A student spending the summer in a fund state who left the state to return to college in the fall was not such a resident as would qualify under the statute.¹¹⁴ In *Rosenfield v. Angerstein*,¹¹⁵ the deceased victim was a resident of Pennsylvania when injured in New Jersey. Her son, a resident of New Jersey, sought recovery from the fund under a wrongful death statute. It was held that the residence of the decedent controls and not that of the survivors. A New York court in *Appleton v. Merchants Mut. Ins. Co.*,¹¹⁶ stated:

[W]here the absence from home is a temporary one, the courts have declined to require that the person seeking coverage dwell under the same roof at the time of the accident to be a "resident of the household" or "member of the family" to come within the meaning of some other similar phrase to effect coverage. . . .¹¹⁷

Hence, it would seem that the courts have construed the term "resident" to mean "domicile."¹¹⁸

110. *Id.* at 364.

111. N.J. STAT. ANN. § 39:6-62 (1961).

112. 55 N.J. Super. 514, 151 A.2d 68 (L. 1959).

113. *Maddy v. Jones*, 230 Md. 172, 186 A.2d 482 (1962).

114. *Continos v. Parsekian*, 68 N.J. Super. 54, 171 A.2d 663 (App. Div. 1961).

115. 71 N.J. Super. 409, 177 A.2d 38 (App. Div. 1962).

116. 228 N.Y.S.2d 442 (App. Div. 1962).

117. *Id.* at 446.

118. See EHRENZWEIG, CONFLICT OF LAWS § 72 (1962).

The real test of reciprocity "is whether the state from which the non-resident comes would extend an equal benefit to a non-resident upon the same facts."¹¹⁹ If there is no similar protection in the other state, or if the other state has a fund statute, but the claimant would be precluded from recovery in the other state, then he would be precluded in his present suit.¹²⁰

In *United States v. Whitcomb*,¹²¹ the United States sought recovery from Maryland's Unsatisfied Claim and Judgment Fund for damages to a post office truck by an uninsured motorist. The United States contended that the Federal Tort Claims Act was "substantially similar" to the fund act. The district court held that the United States is not a "qualified" person within the meaning of the statute, and that the Federal Tort Claims Act is not "substantially similar" to the Maryland statute.

DISCLAIMER OF OTHER INSURER

A motorist is uninsured within the meaning of the uninsured motorist statute if the insurer disclaims liability on the policy.¹²² The South Carolina statute has been interpreted to mean that the insurer must *successfully* deny coverage before a motorist is deemed uninsured.¹²³ Until there has been an adjudication that an insurance company has successfully denied coverage, an insured in South Carolina is not entitled to uninsured motorist protection.¹²⁴ The converse appears to be the result in Virginia, for the statute says nothing of "successful" denial of coverage on the part of the insurer, but speaks only of denial.¹²⁵ In New York it has been held that the disclaimer need not be a valid one.¹²⁶ The mere fact of disclaimer is enough to constitute the other car uninsured. The reasoning behind this New York decision was that whether the disclaimer was valid or not, the innocent victim was precluded from recovery unless the tort-feasor was deemed uninsured, thus entitling the injured victim to seek recovery from the fund.

A disclaimer of liability usually arises where there is coverage, but because of some action on the part of the insured, the company refused to respond. The legislature, however, never contemplated coverage in a case where the insurance company involved becomes bankrupt subse-

119. *Farina v. Motor Vehicle Acc. Indem. Corp.*, 228 N.Y.S.2d 20, 22 (Sup. Ct. 1962).

120. *Ibid.*

121. 200 F. Supp. 249 (D. Md. 1961).

122. VA. CODE ANN. § 38.1-381(c) (Supp. 1962).

123. Dai & Richardson, *The South Carolina Uninsured Motorist Law*, 15 S.C.L.Q. 739 (1963).

124. *Ibid.*

125. VA. CODE ANN. § 38.1-381(c) (Supp. 1962).

126. *Motor Vehicle Acc. Indem. Corp. v. Motera*, 219 N.Y.S.2d 553 (Sup. Ct. 1961); *cf. In the Matter of Bernan*, 171 N.Y.S.2d 869 (Sup. Ct. 1958).

quent to the occurrence of the accident. Thus, bankruptcy of the insurer is not analogous to a disclaimer of the policy which would constitute the other car uninsured.¹²⁷

To have a valid disclaimer, there must be a valid existing policy. A New Jersey court, in *Parrot v. Chiselko*,¹²⁸ held there could not be a disclaimer of a policy which did not go into effect until two days after the accident. The court said:

[T]he statutory wording, "that an insurer had disclaimed on a policy of insurance so as to *remove* or *withdraw* liability insurance," (emphasis added) imports that if the "disclaimer" were not made, a valid policy of insurance would subsist. One cannot *withdraw* or *remove* a thing which never existed.¹²⁹

STATUTORY CONSTRUCTION AND INTERPRETATION

New York courts seem to impose a strict construction and interpretation on their uninsured motorist statute.¹³⁰ Where there is no statutory provision for a stay of an arbitration award, the court will not allow such a stay.¹³¹ The court in *Bogdanoff v. Motor Vehicle Acc. Indem. Corp.*¹³² stated:

[I]f a statute creates a liability where otherwise none would exist . . . it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act.¹³³

An example of the pedantic approach of the New York courts is the denial of coverage where an uninsured auto proximately caused an accident but did not physically come in contact with the injured victim.¹³⁴ The statute requires physical contact between the uninsured auto and the injured party.

New Jersey courts apply a liberal construction to the statute. The court in *Szczesny v. Vasquez*¹³⁵ stated:

127. *Uline v. Motor Vehicle Acc. Indem. Corp.*, 213 N.Y.S.2d 871 (Sup. Ct. 1961).

128. 74 N.J. Super. 138, 180 A.2d 710 (App. Div. 1962).

129. *Id.* at 146, 180 A.2d at 714-15.

130. See, e.g., *Garcia v. Motor Vehicle Acc. Indem. Corp.*, 238 N.Y.S.2d 195 (App. Div. 1963); *In the Matter of Steinetz*, 225 N.Y.S.2d 147 (Sup. Ct. 1962); *Bogdanoff v. Motor Vehicle Acc. Indem. Corp.*, 225 N.Y.S.2d 657 (N.Y. City Ct. 1962).

131. *In the Matter of Steinetz*, *supra* note 130.

132. 225 N.Y.S.2d 657 (N.Y. City Ct. 1962).

133. *Id.* at 658-59.

134. *Bellavia v. Motor Vehicle Acc. Indem. Corp.*, 211 N.Y.S.2d 356 (Sup. Ct. 1961). In the *Bellavia* case, the uninsured auto hit a third auto knocking it into the insured. The court in a strict interpretation held there was no physical contact of the uninsured vehicle with the insured. See *Petition of Portman*, 225 N.Y.S.2d 560 (Sup. Ct. 1962).

135. 71 N.J. Super. 347, 177 A.2d 47 (App. Div. 1962).

The Unsatisfied Claim and Judgment Fund statute is a measure of social legislation. We should construe it liberally, "due regard being had to the protection of the Fund against fraud and abuse and to the fulfillment of the essential legislative policy."¹³⁶

Likewise, Virginia appears to favor a liberal interpretation,¹³⁷ but the courts will not read into the statute a meaning which is not harmonious with the principles of the statute.¹³⁸

CONCLUSION

The purpose of this note has been (1) to point out the need for protection against the hazards of the financially irresponsible uninsured motorist; (2) to point out the inadequacies of the compulsory insurance and financial responsibility statutes; (3) to show the progress which has been made in this area with the enactment of the Fund and Compulsory Endorsement Plans; and (4) to point out the problems connected with these relatively new statutes.

It has not been the purpose of this note to designate one particular plan as the one which should be adopted by a state legislature. However, since there are advantages in both the Fund and Compulsory Endorsement statutes, perhaps the New York Combined Plan would be a plausible solution. Each state legislature must determine which plan is the most feasible and which provides the best possible protection for the citizens of its state.

There are several areas in which the uninsured motorist statutes need clarification. These problems have arisen with respect to (1) notice, (2) insurer's defense of suit against the uninsured tort-feaser, (3) arbitration, (4) residency requirements, (5) disclaimer of the other insurer, (6) statutory construction, and (7) miscellaneous problems which may arise under the statutes. The state legislatures must attempt to solve these problems when drafting their uninsured motorist statutes. The legislatures should:

1. Enumerate clearly the situations in which notice must be given to the insurer; when notice must be given to the fund director; when notice may be excused; and what constitutes "reasonable time" and "physical incapability."
2. Eliminate the two-fold process of trial and arbitration by providing that the entire claim shall be determined in one legal proceeding.

136. *Id.* at 358, 177 A.2d at 52. See *Corrigan v. Gassert*, 27 N.J. 227, 142 A.2d 209 (1958).

137. See *Doe v. Faulkner*, 203 Va. 522, 125 S.E.2d 169 (1962).

138. See *State Farm Mut. Auto. Ins. Co. v. Drewery*, 191 F. Supp. 852 (W.D. Va. 1961).

3. Set out specific rights and duties of the insurers with respect to the defense of the uninsured motorist.
4. Provide that the insurer's entry into the suit will not amount to tacit admission of liability.
5. Set out the requirements of residency in specific language and precisely identify those who will be qualified under the statute.
6. Provide some measure of relief for commuters and other non-residents.
7. Since the statute is remedial, encourage a liberal interpretation of the statute.
8. Explicitly state what situation will constitute disclaimer by the the other insurer so as to deem the tort-feasor uninsured.
9. Provide for the situation of the other insurer's bankruptcy.
10. Provide some method whereby the burden of cost is placed upon the uninsured motorist.
11. Provide adequate procedural devices to afford quick action to an insured's claim.
12. Attempt to adopt a statute which will cover various miscellaneous problems which may arise and have arisen under the existing statutes.

It is hoped that this note will induce action on the part of state legislatures to enact adequate uninsured motorist legislation. Each state should adopt some statutory plan which will solve this complex problem. Now is the time for each state legislature to act, as the need for protection against the financially irresponsible uninsured motorist is greater than ever.

GARY DUBIN